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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 40834
)	
v.)	ADA COUNTY NO. CR 2012-10483
)	
FREDERICK ALLEN HILEMAN,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

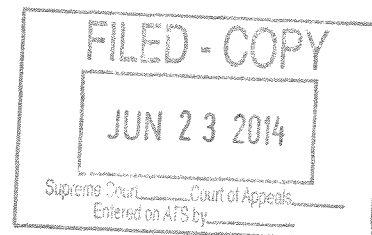
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STATEMENT OF THE CASE

Nature of the Case

Frederick Allen Hileman appeals from his judgment of conviction for lewd conduct with a minor under the age of sixteen. He asserts that the district court erred in admitting I.R.E. 404(b) evidence against him because the probative value of the evidence is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. Further, even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice. This Reply Brief addresses the State's assertions that the evidence at issue is not subject to Rule 404(b) analysis, that Mr. Hileman did not preserve a Rule 403 objection, and that any error is harmless.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Hileman's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err by admitting improper 404(b) evidence against Mr. Hileman?

ARGUMENT

The District Court Erred When It Admitted Improper 404(b) Against Mr. Hileman

A. Introduction

Mr. Hileman asserts that the district court erred in admitting I.R.E. 404(b) evidence against him because the probative value of the evidence was entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. Further, even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

B. The District Court Erred When It Admitted Improper 404(b) Against Mr. Hileman

The State first asserts that Mr. Hileman's statements are not subject to a Rule 404(b) analysis because his statements do not qualify as "crimes, wrongs or acts." (Respondent's Brief, p.6.) The State is incorrect.

First, at trial, the State filed a notice of intent to use I.R.E. 404(b) evidence. (R., p.64.) The State sought to introduce the following evidence: Mr. Hileman's statements that 1) "he does not trust himself around girls so he keeps his distance;" 2) "his trouble with girls began when he was a juvenile and used to inappropriately touch his younger sister;" 3) "he has had inappropriate thoughts about little girls;" 4) "he was ashamed of the things has done and thought of [re: little girls];" and 5) "when he wrestled with girls he has had to say 'no' [due] to the sexual thoughts he has had because 'that's not right.'" (R., pp.64-65.) At the hearing on the motion, the State asserted that these statements, "were relevant to show [Mr.] Hileman's intent at time that he was committing these acts; that they do have probative value that is not

substantially outweighed by any prejudicial value.” (Tr., p.32, Ls.20-25.) Thus, the State clearly took the position that the evidence was subject to Rule 404(b) analysis. The doctrine of judicial estoppel prohibits ‘a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding.’” *Riley v. W.R. Holdings, LLC*, 143 Idaho 116, 121-22, 138 P.3d 316, 321-22 (2006) (quoting *A & J Const. Co. v. Wood*, 141 Idaho 682, 688, 116 P.3d 12, 18 (2005)). The State should be estopped from asserting that the evidence at issue is not subject to a Rule 404(b) analysis.

Second, the evidence is subject to Rule 404(b). Detective Stace testified to the following:

He mentioned that he didn't trust his judgment, that for sometime he had done his best to keep his distance from girls. He – when it was clarified about potentially having some issues with women, he clarified and said, no, girls.

When I asked what kind of scenarios, he talked about wrestling, that he had had thoughts about possibly grabbing breasts because that was an issue for him but, because of that, he keep[s] his distance and tries to stay out of those scenarios.

(Trial Tr., p.212, Ls.2-11.) A recording of the interview was also admitted into evidence. (Trial Tr., p.218, Ls.8-9; State's Exhibit 2.) On appeal, the State asserts that “inappropriate thoughts” are not conduct. (Respondent's Brief, p.7.) The State's argument fails to two reasons: First, the evidence at issue is not simply of “inappropriate thoughts.” It is of actions that accompany those thoughts – namely, keeping his distance from girls, and having those thoughts in previous scenarios while wrestling with girls. This is evidence of “acts.” As to “wrongs”, in *State v. Whitaker*, 152 Idaho 945 (Ct. App. 2012), the Court of Appeals noted that “wrongs” could “broadly include any

sort of “conduct that is likely to reflect adversely on the person in the eyes of the jury even though it has not been forbidden by the positive law.” *Id.* at 948 (quotations and citation omitted). Staying away from girls and having been involved in scenarios where that person harbors sexual thoughts about underage girls would certainly be considered by the jury to be “wrong” even if the person does not act on those thoughts by committing a crime. Second, evidence of inappropriate thoughts, on their own, would be subject to a Rule 404(b) analysis because those thoughts “likely to reflect adversely on the person in the eyes of the jury.” *Id.*

In support of its argument that inappropriate thoughts are not subject to Rule 404(b), the State relies on *State v. Smith*, 135 Idaho 712 (Ct. App. 2001). The State asserts that the Court of Appeals concluded that testimony about the defendant’s “preference for old, heavy-set women and his infatuation with [the victim] was not in itself evidence of a crime, wrong, or act of [defendant] to prove he acted in conformity therewith.” (Respondent’s Brief, p.7.) Mr. Hileman notes that in *Smith*, the State asserted that this evidence was relevant to “motive, identity and intent, and was more probative than prejudicial.” *Smith*, 135 Idaho at 721. That is a Rule 404(b) analysis. The Court of Appeals did not hold that the evidence was not subject to a 404(b) analysis, it simply held that the State was not seeking to show that the defendant “acted in conformity therewith. Rather [the testimony] was relevant to establishing a possible motive and intent on Smith’s part.” *Id.* at 722. Thus, the Court of Appeals held that the evidence was admissible on a proper Rule 404(b) basis.

The evidence at issue in this case is also subject to a Rule 404(b) analysis. And as Mr. Hileman asserted in his Appellant’s Brief, while intent is a valid Rule 404(b)

exception, the probative value of this evidence is entirely dependent upon its tendency to demonstrate his propensity to engage in such behavior. See *State v. Grist*, 147 Idaho 49, 54 (2009).

Second, the State asserts that Mr. Hileman's Rule 403 objection was not preserved. (Respondent's Brief, p.9.) The State's argument fails. At the hearing on the State's motion, Mr. Hileman objected on the basis that the evidence was relevant only to demonstrate propensity. (Tr., p.33, Ls.9-25.) Thus, Mr. Hileman objected. The district court was therefore required to conduct a Rule 404(b) analysis.

Under I.R.E. 404(b), there is a two-tiered analysis for determining the admissibility of "prior bad act" evidence. *Grist*, 147 Idaho at 52. The court must first "determine whether there is sufficient evidence to establish the other crime or wrong as fact" and "whether the fact of another crime or wrong, if established, would be relevant . . . to a material and disputed issue concerning the crime charged, other than propensity." *Id.* If the evidence is insufficient to establish the other crime or wrong as fact, or if the other crime or wrong, even if proven, is not relevant to an issue other than character or propensity, it is inadmissible and the inquiry ends. See *id.* However, if the evidence is sufficient to prove the other crime or wrong, and that crime or wrong is relevant to some valid issue, the court must then "engage in a balancing under I.R.E. 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence." *Id.* Thus, an objection on the basis of Rule 404(b) encompasses an objection on both relevance and unfair prejudice grounds.

However, even if this Court agrees that Mr. Hileman only objected on the basis of relevance, the district court, as required, conducted a Rule 403 analysis:

Here I don't believe that that potential confusion is very high. I think it does clearly go to intent. If requested by the state – or by – I'm sorry – by the defense, I would give a limiting instruction essentially advising the jury that it is limited to determining intent, not to be used to show the defendant's propensity to commit any illegal acts or something of that nature. I would like to see the defendant's proposed instruction, if the defense wants one.

(Tr., p.38, L.15-21.) While the general rule is that an issue may not be raised on appeal unless it was raised to the trial court, “[a]n exception to this rule, however, has been applied by this Court when the issue was argued to or decided by the trial court.” *State v. DuValt*, 131 Idaho 550, 553 (1998)(citing *Northcutt v. Sun Valley Co.*, 117 Idaho 351, 356–57 (1990). Because the district court addressed both relevance and prejudice, Mr. Hileman's claims as to both are preserved for appeal.

Finally, the error is not harmless. Evidence of sexual misconduct is highly prejudicial. As Justice Bistline wrote in *State v. Moore*:

Balancing the prejudice against the probative value is **especially vital in sex abuse cases where the possibility for unfair prejudice is at its highest.**

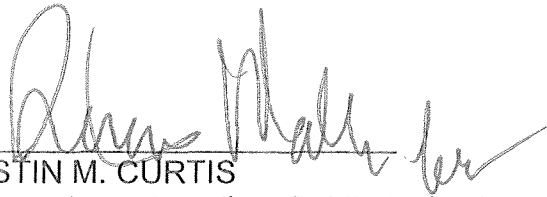
Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

Moore, 120 Idaho 743, 748 (Bistline, J., dissenting) (emphasis added) (quoting Slough and Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 333-34 (1956)). In this case, once Mr. Hileman had been characterized as a person of abnormal bent, it would be relatively easy to arrive at the conclusion he must be guilty based upon propensity evidence. Further, the fact that the evidence at issue in this case was not tied to the alleged victims would give the jury reason to believe that there could be additional, unknown victims, which would be extraordinarily prejudicial.

CONCLUSION

Mr. Hileman requests that his convictions be vacated and his case remanded for further proceedings.

DATED this 23rd day of June, 2014.


JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of June, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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